STATE OF VERMONT

VERMONT SUPERIOR COURT **CIVIL DIVISION**
WASHINGTON **Case No. 24-CV-03770**

CONSERVATION LAW FOUNDATION, INC.
Plaintiff

v.

JULIA S. MOORE, in an official capacity as SECRETARY OF NATURAL RESOURCES,
Defendant.

Memorandum of Law of Plaintiff Conservation Law Foundation, Inc.
in Opposition to the Motion to Dismiss

Introduction

Pursuant to Rule 7(b)(4) of the Vermont Rules of Civil Procedure, Conservation Law Foundation, Inc. ("CLF") submits this memorandum in opposition to Defendant Secretary Moore's (the "Secretary's") motion to dismiss.

In 10 V.S.A. § 594(a)(2), the General Assembly expressly granted citizens the right to bring suit "based upon the failure of the Secretary … to adopt or update rules pursuant to the deadlines in section 593 of this chapter." CLF brought suit under that section. *See* Complaint, ¶ 11.[1] The Secretary does not dispute that the statute gives a Vermonter a cause of action when a rulemaking deadline is unmet. She argues instead that section 593(d) imposes no relevant deadline at all, and thus that the Complaint fails to state a claim upon which relief may be

[1] As the Secretary's motion does not contest, the General Assembly's express grant of a citizen-suit right in section 594(a) creates jurisdiction in this Court. Vt. Const. Ch. II, arts. 28; 31; *see* Complaint ¶ 27.

granted. Her brief ("Brf.") posits that while 10 V.S.A. §593(d) *requires* the Secretary to "complete a review by the date specified," the section "gives the Secretary *discretion* to determine whether or not it is necessary to update the rules." Brf. at 8 (emphasis added).

This reading is wrong. Neither the statute's text nor the cited cases support it. The Secretary does have discretion to decide *which regulations* to adopt or update, but has no discretion to decide *whether to update* regulations at all when the facts, as alleged here, show that doing so is "necessary" to "ensure" achievement of required pollution reductions. The latter duty is mandatory. Because the Complaint adequately alleges that the Secretary breached that duty, the motion must be denied.

Argument

1. Standard of Review.

"A motion to dismiss for failure to state a claim faces a high bar." *Vermont Human Rights Com'n v. Vermont Agency of Educ.*, 2024 WL 4884850, at *1 (Vt. Sup. Ct. Oct. 1, 2024). In *Vermont Human Rights*, the trial court denied defendant-Agency's motion to dismiss, relying on the Vermont Supreme Court's clear articulation of the standard: "A motion to dismiss . . . is not favored and rarely granted," and "[i]n reviewing a motion to dismiss, [the court considers] whether, taking all the nonmoving party's factual allegations as true, it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Id., citing to Alger v. Dep't of Labor & Indus.*, 2006 VT 115, ¶ 12, 181 Vt. 309, 316-17. The trial court must treat reasonable inferences from the complaint as true and the movant's contravening assertions as false. *Id.*; *Kaplan v. Morgan Stanley & Co., Inc.*, 2009 VT 78, ¶ 7, 186 Vt. 605, 607 ("In reviewing the disposition of [a motion to dismiss, the reviewing court] assumes that all well pleaded factual allegations in the complaint are true, as well as all reasonable inferences that may

be derived therefrom."); *Bethel v. Mount Anthony Union High Sch. Dist.*, 173 Vt. 633, 634, 795 A.2d 1215, 1217 (2002). As CLF shows below, application of this standard requires denial of the motion to dismiss.

2. The Duty to Update Rules Under Section 593(d) is Not Discretionary.

In construing statutes, courts begin by "examin[ing] the plain language of the statute [and] presuming that this language was "drafted advisedly, and that the plain[,] ordinary meaning of the language used was intended." *T.C. v. L.D.*, 229 A.3d 77, 80 (Vt. 2020) (quoting *Comm. to Save the Bishop's House, Inc. v. Med. Ctr. Hosp. of Vt., Inc.*, 137 Vt. 142, 153, 400 A.2d 1015, 1021 (1979)) (citations omitted); *see Wesco, Inc. v. Sorrell*, 865 A.2d 350 (Vt. 2004) (observing that, where the plain meaning of the statute is unambiguous, "our inquiry proceeds no further"). The plain meaning of the text used by the General Assembly in its Global Warming Solutions Act (the "GWSA") shows that the duty to update under section 593(d) is not discretionary.

The GWSA requires the Secretary to adopt rules to bring about specific levels of reduction in greenhouse gas emissions, to be measured in specified ways, as of three specific dates. 10 V.S.A. §578; *see* Brf. at 2. The first of these dates, January 1, 2025 ("First Milestone"), is upon us. *Id*. How the milestones are to be achieved is the subject of 10 V.S.A. §593. That section requires the Secretary to undertake technical reviews, conduct public hearings, and adopt, amend and/or update rules. *See, e.g.* §§593(a), (b), (d). The First Milestone is of considerable importance: the statute addresses it three times. Subsection (a) imposes a general duty to conduct factual reviews and adopt rules sufficient to meet all of the milestones (including the first). Subsection (b) obliged the State, prior to December 1, 2022 to "adopt and implement rules" that would "achieve" the First Milestone.

The third provision, subsection 593(d), is at the heart of this lawsuit. The Secretary's brief quotes only part of its text. With key words highlighted, the full text is:

> "The Secretary **shall**, on or before July 1, 2024, **review and, if necessary, update the rules** required by subsection (b) of this section **in order to ensure** that the 2025 greenhouse gas emissions reduction requirement pursuant to section 578 of this title is achieved."

10 V.S.A. § 593(d) (emphasis added).

Grammatically, "shall" modifies two verbs: "review" and "update." The Secretary shall review *and* shall update. And while the duty to update is conditional ("if necessary,"), the data-driven condition for updating does not depend on discretion. The phrase, *"*Review and, if necessary, update" is itself modified by a crucial phrase that the Secretary's brief omits: *"in order to ensure that [the First Milestone] is achieved."* That is, the General Assembly directed that the rules put in place in 2022 *shall be* reviewed and, *if necessary to ensure that the First Milestone is achieved*, *shall be* updated to that end.

When used in the third person, "Shall" is a command – in grammar and in law. In *State v. Rafuse*, the Vermont Supreme Court construed a statute that reads, "[u]pon violation of the terms of probation or of the deferred sentence agreement, the court *shall* impose sentence." 168 Vt. 631, 632, 726 A.2d 18, 19 (1998) (emphasis in original). A probation violator argued that the statute gave the trial judge discretion to decline to impose the sentence. The Vermont Supreme Court disagreed. "Shall," it wrote, "is a word of command, and [] is inconsistent with a concept of discretion." *Id.* at 632, 726 A.2d at 19 (citing cases, and Black's Law Dictionary 1375 (6th ed. 1990)). "[I]nterpretation of the word 'shall' in [the statute] as discretionary would defeat the General Assembly's intent and the purpose of the statute." *Id.* at 633, 726 A.2d at 19. In *Rafuse*, "shall" required imposition of a criminal sentence if the probation or sentence agreement terms

were violated; here, "shall" requires the Secretary to "review and, if necessary, update the rules . . . in order to ensure [achievement of the First Milestone]."

This case is about adhering to the dictates of accurate data, not discretion. Adherence to that accurate data is how the Secretary ensures achievement of the First Milestone. "Ensure" means "to make sure, certain, or safe: guarantee." *Ensure*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/ensure (last visited Dec. 6, 2024); *see also*, DICTIONARY.CAMBRIDGE.ORG, https://dictionary.cambridge.org/dictionary/english/ensure (last visited Dec. 6, 2024) (defining "ensure" as "to make certain that something is done or happens."). By statute, assessment of compliance with the GWSA milestones is governed by inventories and forecasts of Vermont's actual emissions. The Secretary is obliged by sections 578 and 582 of the GWSA to maintain these inventories. 10 V.S.A. §578 requires that levels of emissions be "measured and inventoried," while section 582 sets out specific metrics for preparing regular inventories.[2] Thus, the Secretary's inquiry as to whether the existing rules are adequate to "ensure" — that is, to guarantee — attainment of the First Milestone, is a data-driven mathematical exercise. It involves reviewing the emissions data from the inventories and determining, mathematically, if

[2] The "Inventories" of actual statewide emissions, measured in "tons per CO2 equivalent" are to be itemized by "sources or sectors such as agriculture, manufacturing, automobile emissions, heating, and electricity production." 10 V.S.A. §582(b). Under §578(a), the resulting inventories of actual emissions data test *retrospective compliance* -- whether milestones have been met ("Vermont shall reduce emissions of greenhouse gases … *as measured and inventoried pursuant to section 582 of this title,* by: (1) not less than 26 percent from 2005 greenhouse gas emissions by January 1, 2025 …."). The inventories also provide data from which the Secretary is to "forecast statewide emissions" to assess whether existing regulations "ensure" compliance with future obligations (*prospective compliance*). *See* 10 V.S.A. §582(c).

the projected statewide emissions under existing regulations are guaranteed to be below the numeric GWSA emission reduction requirement. The statute leaves no room for discretion.

When the General Assembly wishes to confer discretion, it drafts statutes very differently. 10 V.S.A. §1427(b) illustrates. The statute concerns the Secretary's management of river corridors and flood plains. Subsection 1427(b) contains the words, "Secretary's discretion" right in its heading. The text sets out a variety of factors to be considered, and then expressly assigns the Secretary discretion in making a technical assessment and determining whether to act:

> the Secretary **may** complete a sensitivity assessment for a river if, **in the Secretary's discretion**, the sensitivity of a river and the risk it poses to life, property, and infrastructure require an expedited assessment.

Id. (emphasis added).

But this Court need not look to other statutes to see that no discretion was intended in subsection 593(d). It need only read on to subsection 593(f). In that subsection, which addresses the timing of updates related to the 2030 milestone, the General Assembly provided that updates are to occur "at [the Secretary's] discretion, but not less frequently than once every two years…." 10 V.S.A. §593(f). Similar language appears in section 593(h).[3] Section 593(d) is nothing like those subsections. It makes no reference to "discretion." It contains none of the usual language that signals legislative intent to confer discretion, such as balancing harms, or weighing various factors. The General Assembly's express reference to "discretion" in subsections 593(f) and (h), and omission of the word in subsection 593(d), underscore what "shall" and "ensure" already indicate: that the General Assembly granted no discretion in subsection (d). *See in re Downer's Estate,* 101 Vt. 167, 177, 142 A. 78, 82 (1928) (where statute specifically exempted towns from

[3] Like the "in order to ensure" clause in subsection 593(d), these subsections are not cited in the Secretary's brief.

paying inheritance tax on legacies "for cemetery purposes," tax applied to legacies for other purposes).

The Secretary's reading would not simply upend the General Assembly's specific designation of what is and is not discretionary. It would make a nullity of sections 593(d) and 594(a). Obligations to update rules "in order to" meet deadlines are by nature prospective. If all prospective updating obligations were discretionary, then the General Assembly's specific grant, in section 594(a) of a citizen-suit right to challenge a failure to update would be meaningless. Readings that render statutes nugatory are generally rejected in Vermont, as elsewhere. *See State v. Baldwin*, 140 Vt. 501, 511, 438 A.2d 1135, 1140 (1981) (observing that Vermont courts do not construe statutes to render a legislative act ineffective and identifying a "presumption that the enactment of meaningless legislation is not intended").

In sum, the General Assembly used plain words. It directed the Secretary to conduct a second review of the State's emissions data no later than July 1, 2024, and, unless those data guaranteed that, by January 1, 2025, emissions would be at least 26 percent lower than 2005 levels, adopt or amend rules to ensure that they would. This duty is not discretionary.

3. The Secretary Relies on Precedent that is Inapplicable, Easily Distinguished, or Both.

The authorities cited in the Secretary's brief do not cure its misreading of the statutory text. First, with one exception, they are federal authorities. This Court must construe a Vermont statute by applying Vermont rules of statutory construction, not cases construing inapposite federal statutory schemes. No Vermont decision supports reading section 593(d) as a grant of discretion whether to update rules at all. As shown above in section 2, the Vermont cases hold to the contrary.

The only Vermont authority cited in the Secretary's brief is *Vt. State Employees Ass'n v. Vt. Crim. Just. Training Council,* 167 Vt. 191, 704 A.2d 769 (1997), a case where a union sued to retain a food-service contract that the State cancelled for budgetary reasons. No statute obliged the Attorney General to preserve the contract, and no words of command like "shall" and "ensure" appeared in any relevant text. Instead, the statute directed that "[t]he Attorney General *may* certify to the Governor that such a contract is not contrary to the spirit and intent [of the law]," *see id.* at 194, 704 A.2d at 771 (emphasis added) – language that clearly conferred discretion on the Attorney General. The Court held that the trial court correctly deferred to this discretion, noting that the "legislation is silent on whether review is available." *Id.* at 195, 704 A.2d at 771 (citations omitted). Here, the GWSA is not silent. It speaks in plain words of command, requiring the Secretary to update rules where necessary to guarantee that the State achieves a numerical standard, and conferring a cause of action on persons in Vermont to bring suit where that achievement is not ensured.

None of the cited federal authorities support the Secretary's argument, and some cut expressly in favor of CLF. Take *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004), *see* Brf. at 6, 10. Plaintiff sued the United States, via the Administrative Procedure Act's ("APA") unreasonable delay provision, for alleged violation of non-impairment obligations with respect to wilderness areas. *Id.* at 60-61. The Supreme Court ruled that dismissal was appropriate, but only because the challenged measure (the Bureau of Land Management's ("BLM") limited grant of off-road vehicle use) was the sort of specific regulation that the agency had discretion to issue. The Court distinguished the case from situations where an agency refuses a mandatory duty to issue *any* regulations. It noted that a court may compel an agency to act when the agency is "compelled by law to act within a certain time" even though "the manner of its action is left to

the agency's discretion." *Id.* at 65. There, as here, "[the statute] is mandatory as to the object to be achieved, but it leaves [the agency] a great deal of discretion in deciding how to achieve it." *Id*. The difference between the federal precedent relied on by the Secretary and the factual allegations at issue here is that the BLM had acted by adopting regulations to achieve a statutory objective, while here the Secretary has not acted at all.

Of similar effect are *Sierra Club v. McCarthy*, 2015 WL 889142, at *10 (N.D. Cal. Mar. 2, 2015) (noting that when agencies fail to act or "follow[] required decision-making procedures," courts should compel them to act, ostensibly according to such decision-making procedures) (citing *Frey v. EPA*, 751 F.3d 461, 469 (7th Cir. 2014); and *Sierra Club v. EPA*, 850 F. Supp. 2d 300 (D.D.C. 2012) (denying agency's motion to dismiss where plaintiff alleged failure to promulgate air pollution regulations by a required date).

Citizens for Const. Integrity v. U. S., 70 F.4th 1289, 1301 (10th Cir. 2023), affords the Secretary no help either. *See* Brf. at 6. Seeking to vacate an agency's issuance of a mining permit, plaintiff proceeded under a statute that authorized suit only where the agency failed "to perform any act or duty under [the statute] which is not *discretionary*." *Id.* at 1295 (emphasis in original). While the same statute made issuance of a permit discretionary, *id.* at 1292, 1309-1312, the court observed that "[t]he statute's use of the word *shall* in [a different] context is strong evidence that the corresponding duties are nondiscretionary—i.e., one is not free to choose whether to perform them." *Id.* at 1309. So too here. In section 593(d), "shall" and "ensure" leave no room for discretion. The Secretary was not free to choose whether to perform either the review or, assuming as true the factual allegations in CLF's complaint, the "necessary" update.[4]

[4] In *Const. Integrity*, the Court rejected a request for a preliminary injunction, but allowed the underlying claims to proceed. Here, granting a motion to dismiss would end the proverbial ballgame.

None of the other cited decisions involves a statute with the sort of mandatory text that the GWSA contains. *See Our Child's Earth Found. v. EPA*, 527 F.3d 842, 851 (9th Cir. 2008) (Clean Water Act's text did not require a specific approach to pollution reduction requirement); *City of Seabrook v. Costle*, 659 F.2d 1371, 1374-75 (5th Cir. 1981) (affirming dismissal where the text of the Clean Air Act did not require the EPA Administrator to make a violation finding every time it learned of a possible violation of a state implementation plan): *Sanitary Bd. of City of Charleston v. Wheeler*, 918 F.3d 324 (4th Cir. 2019) (rejecting citizen suit challenging EPA's disapproval of a state's water quality standards where the Clean Water Act imposes no fixed criterion to identify when approval is necessary).

In short, under section 594(a)(2), the Complaint seeks an order compelling the Secretary to comply with section 593(d), by updating rules. *Which* rules are best suited to meet the volumetric reductions required by statute is a matter of the Secretary's discretion. But whether *some* set of rules is "necessary" to "ensure" that the State meets a numerical standard is not. The Complaint neither proposes a new or updated emissions reduction rule nor asks the Court to do so: it seeks only what the Statute allows – an order directing the Secretary to take action to "ensure" that the First Milestone is achieved.

4. The Complaint Alleges that the Secretary Failed to Update Rules in Violation of Section 593(d).

On a motion to dismiss, well-pleaded allegations must be accepted as true. *See supra* at 2-3. Based on compelling evidence developed by a consulting engineer, the Complaint alleges that Vermont's inventories to date show that the State will fail to achieve the First Milestone by a wide margin – approximately 300,000 metric tons of carbon dioxide equivalent. Complaint ¶¶ 79-82. Accordingly, CLF has alleged with particularity that the Secretary has failed to adopt or

amend rules sufficient to "ensure" achievement of the First Milestone. These allegations state a claim under section 594(a).

But even without its allegations concerning the findings of CLF's expert, the Complaint states a cognizable claim under the GWSA. The Complaint alleges that the Secretary's own consultants expressly advised that the analysis they provided (that the Secretary relied on exclusively) was unsuitable for measuring GWSA compliance.

Section 593(a)(2) directs that, in adopting rules, the Secretary must "[d]evelop a detailed record containing facts; data; and legal, scientific, and technical information sufficient to establish a reasonable basis to believe that the rules shall achieve the State's greenhouse gas emissions reductions requirements pursuant to section 578 of this title."[5] The Secretary engaged Energy Futures Group, Inc. ("EFG"), Complaint ¶ 57, and EFG prepared a report, upon which the Secretary based review of the sufficiency of current regulations. Complaint ¶¶ 68-73. The Secretary did not rely on any other source for this review. *Id*. ¶ 67. The report warns that "updates to the existing model of the State's greenhouse gas emissions were limited and not intended to align the existing model with the State's historic greenhouse gas emissions data, as reported under the State's official Greenhouse Gas Inventory and Forecast (the GHG Inventory), or with the methodology used in the GHG Inventory." Complaint ¶ 62. It cautions that its model of "economy-wide emissions for the GWSA compliance years of 2025, 2030 and 2050 presented in this report **should not be viewed as indicative of the [S]tate's likelihood of achieving those emission levels in those years**." *Id*. ¶ 66 (quoting report at 35-36; emphasis added). In short, the State's consultants advised the Secretary that their report was *not* intended to determine whether

[5] The Secretary concedes that this provision imposes upon the Secretary a mandatory duty of review. Brf. at 2, 14.

existing regulations "ensure" that the First Milestone would be met. Because the Complaint alleges that the Secretary did not rely on any other report for review, as a matter of law, she has failed to ensure the First Milestone will be achieved.

Whatever its provenance, EFG's report could not meet the Secretary's obligation for a second reason. It projected that the State's greenhouse gas emissions as of January 1, 2025 would be only *two-tenths of one percent* within the level required by the First Milestone. Complaint ¶¶ 73-74. All projections have a margin for error. A projection that the State would meet a standard by a hairsbreadth cannot — in the carefully chosen, unambiguous words of the statute — "ensure" achievement of the standard.

In sum, the Secretary concedes that no new rules have been adopted. Brf. at 5. The Complaint alleges that the Secretary's only source disclaims utility as a compliance projection, and projects a margin well under one percent. Complaint ¶¶ 62-74. Thus, the Complaint adequately alleges that the Secretary did not conduct a review sufficient to "ensure" compliance with section 593(d), which itself is a failure to update rules as required by the statute. The Complaint also alleges that fact-based review of the available data projects a substantial failure to achieve the First Milestone. Complaint ¶¶ 80-81.[6] Each set of allegations is independently sufficient to state a claim under sections 594(a) and 593(d).

[6] This Court's current review is on a motion to dismiss. On the merits, the State is free to try to contradict the Complaint's factual allegations. But CLF has pleaded, and will prove that (i) the authors of the "review" upon which the State relied stated that their review was not intended to demonstrate compliance with the First Milestone, (ii) their projected tolerance is so razor-thin that as a matter of law it does not "ensure" compliance, and (iii) aligning the State's projection with its own inventories projects an enormous noncompliance. *See* Complaint ¶¶ 80, 89, 92-94.

Conclusion

The Motion to Dismiss should be denied. Alternatively, CLF should be granted leave to amend the complaint and replead its claims.

Respectfully submitted this 13th day of December, 2024,

Conservation Law Foundation, Inc.

By its attorneys:

/s/ Adam Aguirre
Elena Mihaly
Adam Aguirre
P Sabin Willett*
CONSERVATION LAW FOUNDATION, INC.
15 East State Street, Suite 4
Montpelier, VT 05602
emihaly@clf.org
aaguirre@clf.org
swillett@clf.org
(802) 622-3012
(802) 622-3016
(508) 661-9579

*Admitted *pro hac vice*